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IN THE

Supreme Court of the United States

October Term, 1967

No. ~~1261~~

LEWIS P. GOLDMAN,

Appellant,

v.

THE PEOPLE OF THE STATE OF NEW YORK,

Appellee.

On Appeal from the Court of Appeals of the State of New York

JURISDICTIONAL STATEMENT

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Opinion Below

The opinion of the Court of Appeals of the State of New York, the only opinion rendered by any court below, as yet unreported, appears at Appendix B, *infra*, pp. 3a-10a.

The judgment of the Court of Appeals was entered on December 28, 1967 and appears at Appendix C, *infra*, pp. 11a-12a.

Jurisdiction

Appellant, a member of the New York City Police Department, was convicted of perjury based on testimony given before the grand jury. Judgment was entered against the appellant on March 14, 1966. Said conviction was appealed in the Appellate Division of the Supreme Court on the constitutional grounds that the statutory provisions set forth by Section 1123 of the City Charter of the City of New York, requiring public officers to waive immunity and testify before a grand jury or forfeit their livelihood, was constitutionally repugnant to the United States Constitution, Amendments V and XIV. The Appellate Division of the Supreme Court of the State of New York unanimously affirmed, without opinion, on March 2, 1967. An appeal was taken therefrom to the Court of Appeals of the State of New York by the service and filing of a notice of appeal on March 14, 1966. The grounds of said appeal were similarly that compliance with Section 1123 of the Charter of the City of New York was constitutionally repugnant to the Constitution of the United States, Amendments V and XIV. The Court of Appeals unanimously affirmed and judgment entered accordingly on December 28, 1967. A notice of appeal to this Court contesting the constitutional validity of Section 1123 of the New York City Charter in addition to setting forth other substantial federal questions repugnant to the privileges and immunities conferred by the United States Constitution was served and filed on February 21, 1968. The jurisdiction of this Court to review is conferred by 28 U.S.C. §1257(2) in that there was drawn in question the validity of Article I, Section 6

of the New York State Constitution and Section 1123 of the New York City Charter on the ground that they were repugnant to the Constitution of the United States and the decision was in favor of their validity. Alternatively, certiorari jurisdiction is conferred by 28 U.S.C. §1254(1) in that the holding below is repugnant to the privileges and immunities conferred by the Constitution of the United States, Amendments V and XIV. That jurisdiction exists in the circumstances of this case is sustained by the following decisions: *Torcaso* v. *Watkins*, 367 U.S. 488; *Adamson* v. *California*, 332 U.S. 46; *King Mfg. Co.* v. *Augusta*, 277 U.S. 100; *Poulos* v. *New Hampshire*, 345 U.S. 395, 402; *Garrity* v. *New Jersey*, 385 U.S. 493; *Stevens* v. *Marks*, 383 U.S. 234; and *Spevak* v. *Klein*, 385 U.S. 511.

Constitutional Provisions and Statutes Involved

The constitutional provisions involved are the First, Fourth, Fifth and Fourteenth Amendments of the Constitution of the United States.

The texts of all sections of statutes are set forth in full in Appendix A, *infra*, pp. 1a-2a.

New York State Constitution, Article I, §6, Manual for the Use of The Legislature of the State of New York, 1966-1967, p. 16 (John P. Lomenzo, Secretary of State, Albany, N.Y.); McKinney's Laws of New York Annotated, Book 2, Part 1, Constitution, pp. 12-13 of 1967 Pocket Supplement (Edward Thompson Company, Brooklyn, N.Y.).

New York City Charter §1123, New York City Charter and Administrative Code Annotated, Vol. 1, p. 30 (Williams Press, Inc., Albany, N.Y. 1963).

Questions Presented

1. Is Article I, Section 6 of the New York State Constitution and Section 1123 of the New York City Charter repugnant to the United States Constitution in that a public officer who refuses to sign a waiver of immunity and claims a privilege against self-incrimination suffers a penalty of loss of his position and is thereafter barred from public employment?

2. Was the threat of dismissal from his employment made to appellant should he choose to invoke his constitutionally guaranteed privilege against self-incrimination, pursuant to Section 1123 of the New York City Charter, in violation of said privilege against self-incrimination, his right to due process and his privileges and immunities under the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States?

3. Can the appellant's testimony, obtained by depriving him of his privilege against self-incrimination, and denyng him the right to remain silent, be used for any purpose in a subsequent criminal proceeding against him without violating his constitutionally guaranteed rights under the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States?

Statement

The appellant was a member of the Police Department of the City of New York for nineteen years and six months. On September 24, 1964, while still performing his duties as a uniformed patrolman, appellant was subpoenaed to ap-

pear before the grand jury and requested to execute a waiver of immunity. Before executing said "waiver" and again before giving any testimony, he was advised by the Assistant District Attorney that he could invoke his federal privilege against self-incrimination only on pain of losing his public employment; that to retain his job he was obliged to sign a waiver; and that should he sign a waiver he would have no immunity in answering incriminating questions. Faced with this admonition, petitioner signed the "waiver" and testified the testimony thus obtained, which concerned itself with whether or not appellant "knew" or "received anything" from an individual named Johnson four years earlier, was used as the basis of an indictment and conviction for perjury. Pursuant to said conviction, petitioner was sentenced to a term of incarceration of eighteen months to three years in the New York State Penitentiary. Petitioner is presently on bail pending the outcome of his appeal.

Appellant contends, as he did in the courts below, that his testimony was obtained by coerced compliance with a statute (§1123 of the New York City Charter) that is repugnant to the Constitution of the United States, Amendments I, IV and XIV. Consequently he was placed in a constitutionally proscribed dilemma; and that he was coerced into giving testimony in violation of his privilege against self-incrimination in that he was denied the right to remain silent and not be a witness against himself; nor did he receive any immunity or testimonial protection in the event that truthful statements might have incriminated him. That in such event the state had no right to demand and extract incriminating testimony and *a fortiori* he can-

not be held criminally accountable for failing to give it. Similarly, any testimony given was involuntary and likewise cannot be the basis of a criminal prosecution. That to permit a criminal prosecution to be premised on testimony obtained under such duress is to deny appellant his constitutionally guaranteed right against self-incrimination and equal protection of the law.

Said contentions were presented in the briefs filed in the Appellate Division of the Supreme Court of the State of New York thereby raising the federal question. Further, the same contentions were made to the Court of Appeals of the State of New York that the application of the statute, the appellant's dilemma, the coerced testimony and its subsequent use in a criminal proceeding were all repugnant to the United States Constitution. The questions presented to the Appellate Division and the Court of Appeals of the State of New York and the recitation of the facts in the opinion of that court were of a nature to bring this case within the statutory provisions believed to confer jurisdiction on this Court. 28 U.S.C. §§1257(2) and 1254 (1).

The Question Is Substantial

1. The federal question is substantial. The statute herein (§1123 of the City Charter of the City of New York) provides that where any city employee refuses to testify concerning city affairs "on the ground that the answer would tend to incriminate him, or shall refuse to waive immunity from prosecution * * * his term or tenure shall terminate." That section is in all substantial respects

identical to Section 903 of the New York City Charter which was held to be violative of the due process clause of the Fourteenth Amendment by this Court in *Schlochower* v. *Board of Education*, 350 U. S. 551, in that it upholds automatic termination of employment upon invocation of the privilege against self-incrimination.

That such a penalty can be imposed on public officers should they exercise their constitutional privilege is the underlying premise of the decision in the court below. The result therein reached is dependent on the validity of the precise procedure that *Schlochower* condemned as unconstitutional and is therefore in direct conflict with the decision of this Court. As in the instant case, the validity of the questioned statute was upheld in *Gardner* v. *Broderick*, 20 N.Y. 2d 227, which case was cited in the opinion in this case as the basis for compelling the appellant to testify.

The significance of the question herein was recognized by this Court in that probable jurisdiction has been noted in *Gardner* and that case is presently pending before this Court.

A writ of certiorari was similarly granted in *Uniformed Sanitation Men's Association, Inc.* v. *Commissioner of Sanitation of the City of New York* (No. 823) wherein the same question was raised.

At the very least, this Court has recognized that importance of this question and indicated that it may still be an open one (see *Spevak* v. *Klein*, 385 U.S. 511, 516; *Stevens* v. *Marks*, 383 U.S. 234, 243).

That the question is federal in nature cannot be gainsaid and is equally inconsistent with a line of cases decided by this Court subsequently, holding that the Fourteenth Amendment prohibits not only arbitrary and summary dismissal from public employment but also compulsory self incrimination by the states. In *Malloy* v. *Hogan*, 378 U.S. 1, 6, this Court held that "the Fifth Amendment's exception from compulsory self-incrimination is also protected by the Fourteenth Amendment against abridgement by the states." This principle has been affirmed and upheld by this Court in subsequent decisions. *Murphy* v. *Waterfront Commission of New York Harbor*, 378 U.S. 52; *Stevens* v. *Marks, supra; Spevak* v. *Klein, supra;* and *Garrity* v. *State of New Jersey, supra.*

2. On the premise that Section 1123 of the New York City Charter is constitutionally valid and not tantamount to compulsory self-incrimination and a denial of due process, the court below contended that the state has the right to compel truthful testimony even if such truthful statements would be self-incriminating.

The constitutional repugnancy of such a holding is compounded where, under the facts herein, there was no conferral of immunity by statute or by operation of law (*Stevens* v. *Marks, supra*); nor was there a valid waiver of immunity sufficient to supplant the privilege against self-incrimination (*Stevens* v. *Marks, supra; Garrity* v *New Jersey, supra*) historically and legally the *quid pro quo* for the right of a state to demand incriminating testimony.

Similarly ignored was this Court's decision in *Garrity* in that the court below would permit testimony obtained

under a procedure requiring compulsory self-incrimination and constituting coercion, i.e., waive immunity and testify or forfeit livelihood, to be offered in evidence against the petitioner in a subsequent criminal proceeding.

The decision of the court below if left standing would stand for the proposition, unique in American jurisprudence, that a person may be criminally liable for failing to do that which he is constitutionally protected from being forced to do and which the state is expressly prohibited from requiring him to do.

Surely, at the very least, such a decision represents an innovation of such overwhelming significance that it deserves plenery consideration by this Court.

3. Even if the constitutional validity of Section 1123 of the New York City Charter was upheld, the decision below is in direct conflict with this Court's decision in *Stevens* v. *Marks, supra,* and *Garrity* v. *New Jersey, supra.*

The lower court herein conceded that the waiver of immunity executed by petitioner was "ineffective to prohibit him from raising his right against self-incriminating testimony bearing on a substantive crime * * *" (*infra,* p. 8a).

The supposed possession of the unwaived privilege is equally the foundation of the lower court holding herein in that since it remained to him he could have invoked it, thereby giving him an acceptable alternative to the repugnant perjury. To contend that the appellant possessed a viable privilege against self-incrimination is to abandon reality and to ignore *Stevens* and *Garrity.*

There, as here, petitioner was "led to believe that he could invoke his federal privilege against self-incrimination only on pain of losing his public employment; that to retain his job he was obliged to sign a waiver; and that should he sign a waiver he would have no immunity in answering incriminating questions."

As aforesaid, no immunity was conferred upon appellant by active conferral pursuant to statute (§2447 New York Penal Law); nor by operation of law; nor was it suggested that if he responded with incriminating answers any immunity might preclude a prosecution based on such answers. Nor was it suggested that at the very least he would be accorded testimonial protection so that if not completely immune from prosecution, his own statements could not be offered in evidence against him in a subsequent prosecution as decreed by *Garrity*.

Rather, he was actively misled to the contrary by statements upon which he had a right to rely. Appellant was placed in a dilemma even more imposing than the one characterized as the "Rock and the Whirlpool" characterized in *Garrity*. Suffice it to say his privilege against self-incrimination was effectively taken from him and no constitutionally accceptable substitute proffered.

At the very least, a significant and vital question exists as to whether the appellant's privilege against self-incrimination was violated and merits plenary consideration by this Court.

Conclusion

It is respectfully submitted that the Court should note probable jurisdiction of this appeal.

Dated, New York, N.Y.
February 23, 1968.

Respectfully submitted,

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